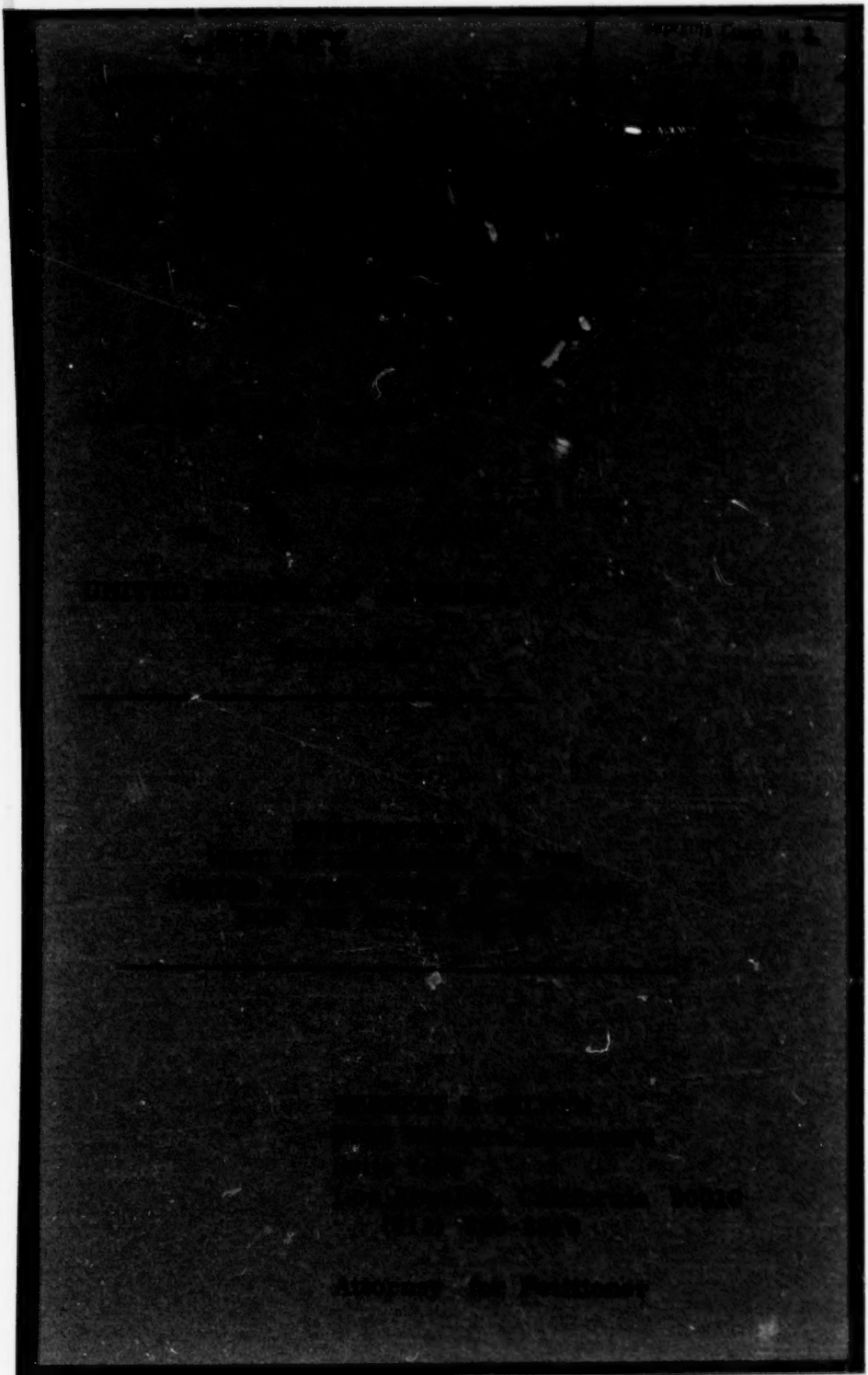


IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975
No. _____

GUSTAVE CARL GALAS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TO THE CHIEF JUSTICE AND TO THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in United States of America vs. Gustave Carl Galas, No. 74-3086, predicated upon the following:

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254 (1), petitioner having asserted below deprivation of rights, secured by the Constitution of the United States. Petitioner filed a motion with this Court for an extension of time in which to file a petition for a writ of certiorari. On November 13, 1975, the Honorable William J. Brennan, Jr. entered an order extending the time for filing a petition for certiorari up to and including December 15, 1975.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth and the Sixth Amendments to the Constitution of the United States.

STATEMENT

Petitioner was indicted on April 15, 1974 and was arraigned and entered a plea of not guilty on May 13, 1974.

On August 16, 1974 he was found guilty on all four counts of the indictment.

On September 23, 1974, after denial of his motion for new trial, petitioner was sentenced to the custody of the Attorney General for two years, on each count, to run concurrently.

Timely Notice of Appeal was filed and on October 16, 1975 the United States Court of Appeal, for the Ninth Circuit, affirmed the conviction.

A copy of the unpublished Order affirming is appended hereto as Appendix "A".

QUESTION PRESENTED

Does the Court below's refusal to grant a short continuance for an incapacitated attorney amount to denial of petitioner's right to counsel under the Fifth and Sixth Amendments to the Constitution of the United States?

ARGUMENT

Petitioner was indicted on April 15, 1974, charged with violations of 26 U.S.C. 7206(2), assisting and counseling in the preparation of an income tax return which was false and fraudulent as to a material matter. On May 13, 1974, petitioner entered a plea of not guilty. On August 4, 1974, petitioner's retained counsel, James P. Cantillon, received a severe injury to

his right eye, received emergency treatment on August 4 and August 5, 1974 (C.T. pp. 58-59). Michael Gurdin, M.D. prepared a declaration under penalty of perjury verifying that Mr. Cantillon will be disabled from work for approximately seven to fourteen days (C.T. p. 60). On August 5, 1974, an attorney appearing for James Cantillon moved for continuance after the affidavits were filed with the Court. The Court denied the said motion and ordered counsel to return on August 6, 1974 for selection of jury, and Court may grant short continuance (C.T. p. 61). The jury was selected and the matter trailed to August 8, 1974 at which time Attorney Cantillon moved for continuance or for severance of petitioner. The said motion was denied and the matter ordered continued on August 9, 1974 at 9:00 A.M. for further jury trial.

That on August 8, 1974 Attorney Cantillon filed an affidavit indicating that due to his disability he was required to take three drugs which impaired his mental alertness, causing him to stagger, have a lethargic, depressed feeling, causing confusion, drowsiness and memory impairment. That no other attorney was knowledgeable enough to effectively represent petitioner in the trial and that affiant could not competently represent defendant during the trial as he suffered impairment of vision and vertigo (C.T. p. 65).

The affidavit of Warren O. Cagney, Jr., M.D., stated:

"If a patient is under the influence of these drugs under no circumstances should he perform any jobs or acts that require mental alertness or memory recall. In fact, if an attorney attempted to represent a client while under the influence of these drugs, it would be my opinion that he could be held for gross malpractice.

"I most sincerely feel that Mr. Cantillon cannot perform his job as an attorney properly while taking these medications. It would be at least one week before the total effects of the drugs will wear off.

"Further, affiant says not." (C.T. p. 69.)

In spite of all of these affidavits, the Court forced petitioner to continue trial with counsel, that due to the injury and the drugs in his system was incompetent.

On August 8, 1974 the following colloquy took place in the presence of the jury:

"THE COURT: In the case of United States vs. Galas and others let the record show that all the members of the jury are in their places and the defendants and counsel are before the Court.

"MR. CANTILLON: May I approach the podium, your Honor?

"THE COURT: Yes.

"MR. CANTILLON: Your Honor, I filed two affidavits this morning relative to my physical condition, and I would request that the Court act favorably upon them, either continue this matter or sever Mr. Galas out. I cannot go to trial, and with all due respect to the Court, will not go to trial in my present condition.

"I am suffering severe headache, vertigo, I'm taking heavy doses of drugs, memory-effecting, emotionally-effecting, and I think it would be malpractice for me to attempt to represent Mr. Galas. I think I have no right to go to trial in my present condition, and no question in my mind Mr. Galas would not be effectively represented by counsel.

"THE COURT: Mr. Cantillon, this condition is not new. It seems to certainly be something that you were aware of some several days now. This case has been continued since, I think May or so because of your hospitalization, and a result of other matters, and your office is not a

one-man office. There are other lawyers in your office who could and probably are prepared to proceed in this case.

"MR. CANTILLON: There are no other lawyers in my office prepared to proceed in this case, your Honor. There is one other lawyer that works for me, Mr. Wayne Anthony, who appeared in connection with continuing the matter in May. He practices with me.

"THE COURT: Is Mr. Anthony here?

"MR. CANTILLON: Yes, he is here in court, your Honor.

"THE COURT: Let Mr. Anthony proceed with the trial of the case.

"MR. CANTILLON: Mr. Anthony is not in any position to proceed with the case; he knows no more about the ca e than the jurors know at this time, you Honor.

"THE COURT: Mr. Cantillon, if Mr. Anthony does not know anything about the case I consider it negligence on your part that you have not had him acquaint himself with the case.

"MR. CANTILLON: Well, I hope your Honor understands that until Sunday last I was prepared to proceed with this case. The injury I sustained, I sustained on Sunday, Sunday afternoon, required emergency treatment Sunday and Monday, and as a matter of fact, I have an appointment at 10:00 this morning with the doctor for further treatment of the eye. It's not an injury that is a slight injury.

"I've been before your Honor on many occasions before. I believe I've appeared before almost every judge in this District Court and never that I can recall sought a continuance except on one occasion, and that was because I was in the middle of a trial in the State court. We picked the jury because it was, as I recall, a State holiday, election day, and we trailed the case three or four days, at the conclusion of which we commenced the trial. That happened to be the Friar's Club case, with which the Court may be familiar. I am not seeking to delay the trial --

"THE COURT: I don't want anyone in this courtroom to think that I believe that you are misrepresenting the facts of your physical condition, but when this case first came to this court, and it must have been May or

April, someone from your office came in to say that you were in the hospital, and when I continued it a month until you were able to come out, and if I remember the facts correctly, it was necessary for it to be continued again after then because of either your continued hospitalization or some other personal problem that you had.

"MR. CANTILLON: I was hospitalized April the 4th, 1974 until, I believe it was July 16th, with two brief periods --

"THE COURT: This case, whereas the ordinary case is tried within 30 days in this court at the time of the taking of the plea, it must be at least four months now away from that date, and this case is going to trial this morning, and I am not going to compel you to remain here, but I am going to compel Mr. Anthony to represent your client.

"MR. CANTILLON: Well, your Honor, I don't think Mr. Anthony could be compelled to represent my client because he is not in a position to represent my client.

"THE COURT: Mr. Anthony is, by the order of this Court, directed

at this moment to represent your client.

"Where are you, Mr. Anthony? Come forward and take your place at the counsel table, sir.

"MR. CANTILLON: Well, your Honor, at the risk of being in contempt of this court, I'm going to tell Mr. Anthony --

"THE COURT: Before you go any further, Mr. Cantillon, your risk is a decided one. It is a risk that I will not countenance, and I will not have you flount the orders of this court. So, if you are about to say that you are not going to let Mr. Anthony remain here with your client I shall see to it that either you or Mr. Anthony or both of you are severely punished if Mr. Anthony does not take his place at this counsel table.

"Be seated, sir, and take your place.

"MR. CANTILLON: Mr. Anthony -- one moment, your Honor --

"THE COURT: Call a Deputy Marshal to this courtroom, Mr. Bailiff, immediately.

"MR. ANTHONY: Your Honor, may I be heard?

"THE COURT: Ladies and gentlemen of the jury, will you please discuss nothing about this case, and will you please step down and go into the jury room until you are summoned again." (R.T. p. 7, line 3 - p. 11, line 8.)

"MR. CANTILLON: I think Mr. Anthony said he wanted to be heard.

"THE COURT: Mr. Anthony.

"MR. ANTHONY: Yes, your Honor. I just want the record to indicate -- may I speak here from the counsel table?

"THE COURT: Yes.

"MR. ANTHONY: I have not done anything in this case other than appear, and I wish to correct the Court, I believe it was only one continuance granted in this case, and that was the one in June because of Mr. Cantillon's health. I am not familiar with the facts of this case. I know nothing of the law covering this case, I am not even familiar with the income tax regulations and the law pertaining thereto.

"Furthermore, that because Mr. Galas retained Mr. Cantillon to represent him and has throughout these proceedings told Mr. Cantillon as well as myself that he wanted no one to represent him but Mr. Cantillon, on that basis I have not done anything in preparation for this case, only Mr. Cantillon has.

"THE COURT: Mr. Cantillon is invited to sit by you at this counsel table and to proceed and to advise you and to do anything else that is necessary for the continued progress of this case. But it is going to proceed from this point, and you gentlemen might just as well make up your mind about it.

"MR. ANTHONY: Your Honor, one other thing I would like to state to the Court; some six months ago I made arrangements to be in Milwaukee, Wisconsin this weekend. I am to leave tomorrow.

"THE COURT: Your plans must be changed, sir. I'm very sorry to have to be a party to that, but this is a multi-defendant case, other lawyers are involved, the Government's witnesses have come from other states, is that correct, sir?

"MR. WILSON: Yes, your Honor.

"THE COURT: How many witnesses will you have?

"MR. WILSON: We will have about 12 witnesses, your Honor.

"THE COURT: And are they from other states?

"MR. WILSON: Yes, and those that are from California are from some distance from Los Angeles, out in the desert, your Honor.

"THE COURT: Yes, I'm sorry, gentlemen, but if I sound more firm than I should sound, I find that there is sufficient reason for doing so. This case must proceed to trial.

"DEFENDANT GALAS: May I be heard on this matter, your Honor?

"THE COURT: No, sir. Be seated, please.

"Seat the jury, Mr. Bailiff." (R.T. p. 11, line 20 - p. 13, line 19.)

It is clear from the discussion between the Court and counsel that there was no question in the Court's mind as to Mr. Cantillon's disability

and it is also clear that the disability is one that occurred two days prior to the matter being called for trial and was not foreseeable by petitioner or Mr. Cantillon. Mr. Cantillon's assistant, Mr. Anthony, stated clearly on the record that he knew nothing about the facts of the case or the law involved, and the Court was firmly informed by Mr. Cantillon that Mr. Anthony knew no more about the matter on trial than the jurors at that time.

The affidavits of the doctors indicated in very strong language, as heretofore cited, that Mr. Cantillon was in no physical condition, or did he have the mental ability to try the case below.

In Powell v. Alabama, 287 U.S. 45, 53 S. Ct. 55, stated at page 382:

> "It is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case. To hold otherwise would be to ignore the fundamental postulate, already adverted to, 'that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard.'"

The Sixth Amendment to the Constitution of the United States guarantees the right of an accused to be represented by counsel and the Fifth Amendment guarantees due process, which in Powell and succeeding cases has been held to include "effective counsel."

The finest, most experienced advocate in the nation, if crippled by illness and befogged by drugs, will be ineffective.

In a line of California cases, including People v. McDowell, 69 Cal.2d 737, Powell v. Alabama is cited for the proposition that a constitutional right of "effective representation" is required. Here, a case in which the arraignment took place in the middle of May could have been continued for a week or two to permit the injuries of Mr. Cantillon and the effects of the drugs used in treating them to dissipate. The refusal of the Court to grant the short continuance requested by petitioner and amply supported by the affidavits of the doctors and Mr. Cantillon, as well as the discussion in open Court, was a flagrant abuse of discretion effectively denying counsel to petitioner.

In Reynolds v. Cochran, 365 U.S. 526, 81 S.Ct. 723 this court stated:

> "In Chandler v. Fretag, we made it emphatically clear that a person proceeded against as a multiple offender has a constitutional right to the assistance of his own counsel in that proceeding. Under the facts of this case, as alleged

in the petition filed before the Florida Supreme Court, the decision in Chandler is squarely in point and controlling. Under those facts, the statement of this Court in Powell v. State of Alabama, which provided the basis of our holding in Chandler, is wholly applicable: 'If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.'

"The State seeks to avoid the application of the holding in Chandler on the basis of a contention that even if it was error for the trial judge to deny petitioner's motion for a continuance, that error was harmless under the facts of this case. The argument offered in support of this contention is that since petitioner admitted the only fact at issue in the proceeding - that he had been convicted of a previous felony in 1934 as charged in the information - a lawyer would have been of no use to him. We find this argument totally inadequate to meet the decision in Chandler. Even assuming, which we do not, that the deprivation to an accused of the

assistance of counsel when that counsel has been privately employed could ever be termed 'harmless error,' it is clear that such deprivation was not harmless under the facts as presented in this case. In the first place, petitioner asked for a continuance to enable him to consult with counsel before he admitted the truth of the charge of prior felony conviction. Thus, if petitioner had been allowed the assistance of his counsel when he first asked for it, we cannot know that counsel could not have found defects in the 1934 conviction that would have precluded its admission in a multiple-offender proceeding."

In Hoyt v. State of Florida, 368 U.S. 52, 82 S.Ct. 157 this court held that denial of counsel at the time of arraignment required reversal of conviction even though no prejudice was shown. A fortiori, an effective denial of counsel at the time of trial must require a reversal of the conviction. Here, however, much prejudice can be shown by the failure of counsel for petitioner below to effectively defend him at the trial. The court, in effect, sacrificed the rights and interests of petitioner to the expediency of the calendar of the District Court.

The following colloquy occurred in open court:

"MR. CANTILLON: You see the position you are placing us in,

your Honor.

"If I may be respectfully so, you are placing us in a condition we can do nothing other than just sit here during this trial and, in effect, it's going to be no trial as far as Mr. Galas is concerned. Mr. Anthony is not in the position to try the case; he is not in the position to participate in the proceedings, he knows nothing about it. I, obviously, am not in position to proceed in the case, and I think to compel us to sit here and -- you could sever Mr. Galas out.

"THE COURT: I have no intention of doing that, Mr. Cantillon. We are going to proceed with this case, and I'm aware of the fact that you are due in Judge Curtis' court next Tuesday on a case that he has had to continue many times for the last, almost eight months, and he is quite disturbed that you allowed a jury to be picked in this case without notifying me of your appearance before him in a multi-defendant case with many lawyers involved that is set for next Tuesday. And I promised him that I would speed this case along as expeditiously as possible in order to free you for his court next week.

"MR. CANTILLON: That information was conveyed to this court and the Court may not recall that, but at the time this case was set I was in the hospital. Through inadvertence the case was set for August 3rd, I believe. Is that correct, Mr. Anthony?

"MR. ANTHONY: Your Honor, I appeared here on the -- prior to the date of trial that this case was set for in June, and then I again appeared on the date of trial to seek a continuance. At that time we filed an affidavit with the Court informing the Court of Mr. Cantillon's condition, also informing him of the calendar problems that he had in August, including in that affidavit a statement that he was due to start trial in Judge Curtis' courtroom on August the 3rd.

"THE COURT: I could not be expected to remember all of those facts in an affidavit filed sometime in August.

"I think it was incumbent upon Mr. Cantillon or the person who was here representing him at the time this jury was selected last Tuesday to have called those matters to my attention. But we are wasting time, gentlemen, we are proceeding, so let's proceed.

"Seat the jury, Mr. Bailiff.

"MR. CANTILLON: Well, I want it clearly understood, your Honor, that this is over our objection.

"THE COURT: Yes, the record will so show.

"MR. CANTILLON: In our opinion Mr. Galas is being deprived of due process of law.

"THE COURT: I refuse to believe that a lawyer in your office who has been there, especially if it's only a two-man office, that has been there during all the time that this case has been in your office, knows nothing about the case. I refuse to believe that, and I was a part of a two-man office during the time I practiced law.

"MR. CANTILLON: It may be a two-man office but we are not a one-case office, and I think that is the explanation.

"DEFENDANT GALAS: May I be heard with respect to that?

"THE COURT: No, sir.

"Please be seated, Mr. Cantillon." (R.T. p. 14, line 13 - p. 16, line 21.)

The record is replete with failure of Mr. Anthony and/or Mr. Cantillon to object to hearsay, to lack of foundation, speculation, argumentative questions, conclusions of law or fact, to the testimony elicited by the government, and the various witnesses or defendants.

Although a case involving these statutes involves complexities often unintelligible to the layman, counsel for the defense proposed no questions to be asked the prospective jurors on voir dire. They requested no special instructions which would have clarified the law and benefited the petitioner herein.

Government's Exhibit 2, a purchase offer, was presented to the government witness, Dr. McAdams (R.T. p. 39, line 19-26). There was no objection to lack of foundation to testimony that petitioner wrote a portion of the document. There was no information elicited to show that Dr. McAdams either recognized the handwriting or saw it written by petitioner. This was, of course, in direct dispute in the trial. There were statements made by co-defendants, outside of petitioner's presence; there were no objections interposed as to the question of admissibility as to petitioner (R.T. p. 51, line 17-20).

At the point where the government moved into evidence certain exhibits, Mr. Cantillon stated, in effect, that he would be unable to look at and analyze the exhibits (R.T. p. 58, lines 8-16).

Again, indicating, that due to his illness and the effects of the drugs upon his abilities, he would be unable to intelligently analyze the exhibits as to the question of admissibility. Mr. Anthony had stated, and Mr. Cantillon had stated, on the prior cited occasions, that he, Mr. Anthony, knew neither the law nor the facts sufficiently to acquaint himself with the effect of these documents. After looking at the documents, Mr. Anthony stated:

> "MR. ANTHONY: Over the noon recess I attempted to review these documents, these Government's exhibits. I have been unable to make a lot of sense out of a lot of them, I'm unfamiliar with a lot of forms that are being used. I also had an opportunity to talk to Mr. Galas about this matter. He expresses the desire, would like to express the desire to the Court that he does not want me to represent him.
>
> "I further would like to at this time explain to the Court what my experience is so that the Court can consider my ability to go forward as his counsel in this case.
>
> "THE COURT: Counsel, I am not going to hear you on this any more. Mr. Cantillon is in court with you, Mr. Galas is a lawyer, and I see no reason to believe that Mr. Galas is not going to be adequately represented

by you. And I'm going to give him an opportunity, if he cares to, to ask questions on cross examination of any witness that appears in this case. I'm not going to prolong this case with bellyaching every time we take a recess. So please retire to the counsel table." (R.T. p. 73, lines 16-25 and p. 74, lines 1-9.)

To further indicate Mr. Cantillon's incapacity, when cross examining Dr. McAdams about an organization in which he and petitioner were involved according to some evidence, asked:

"Q. It's an organization that specializes in teaching people with high income sophisticated methods of evading or avoiding the payment of income tax, correct, through a tax shelter method?

"A. Yes." (R.T. p. 127, lines 22-25 to p. 128, line 2.)

Certainly, no counsel who had all of his faculties would imply that his client was involved with an organization teaching sophisticated methods of evading payment of tax; therefore, this must have been done unwittingly, especially the use of the word "evading."

The entire conduct of the Court as shown in the previously quoted portions of the transcript indicates a bias toward petitioner and a flaunting of his constitution right to counsel which cannot be

excused in protecting the sanctity of the Court's calendar.

The effect upon the jury of the statements of the Court certainly cannot help but militate against the interests of petitioner.

It is submitted that a healthier Richard Cantillon utilizing the normal skills of an advocate in the Federal Court could probably have obtained an acquittal for petitioner. Nowhere in the reported cases can we find any instance of a court's agreeing that counsel is injured and disabled, and where uncontradicted proofs of inability due to the effect of drugs prevents a fair representation of a client, where defendant has been forced to trial.

CONCLUSION

For all of the reasons hereinabove set forth, factual and legal, it is respectfully submitted that the judgment be set aside as to all four counts, and the conviction reversed.

Respectfully submitted,

HERBERT E. SELWYN

Attorney for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. GUSTAVE CARL GALAS, Defendant-Appellant.	)	No. 74-3086 ORDER

[October 16, 1975

Appeal from the United States District Court
for the Central District of California

Before: BROWNING and ELY, Circuit Judges, and SHARP,* District Judge.

We are satisfied from an examination of the record that appellant was afforded fully effective assistance of counsel. We do not reach appellant's challenges to the sufficiency of the evidence as to Count IV, since the sentence imposed on that count is to run concurrently with the same sentence on other counts.

Arrifmed.

*Honorable Morell E. Sharp, United States District Judge, Western District of Washington, sitting by designation.